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Supreme Court of the United States

TERM, 1964.

No. 1018

STATE OF NEW JERSEY,
Petitioner,

vs.

WAYNE GODFREY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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Term, 1964.

No.

STATE OF NEW JERSEY,
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vs.

WAYNE GODFREY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on July 17, 1963.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court is unreported and is printed in Joint-Appendix, Volume I, hereto, *infra*, p. 40a. The opinion of the Circuit Court of Appeals is unreported and is printed in Joint-Appendix.

JURISDICTION:

The judgment of the Circuit Court of Appeals was entered on July 17, 1963 (Joint-Appendix). Rehearing was denied on January 24, 1964. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Whether the Court of Appeals, in concluding that defendant's confession was involuntary, erroneously considered psychiatric reports concerning defendant and other matters *dehors* the record.

Whether the Court of Appeals gave undue weight to the testimony of defendant and came to conclusions unjustified in the inadequate record before it.

STATEMENT.

The defendant, Wayne Godfrey, was indicted by the Camden County Grand Jury, along with two co-defendants, for murder committed during an attempted robbery. The State proceeded on a felony-murder theory. The jury found the defendants guilty of murder in the first degree, without a recommendation of life imprisonment. This conviction, in the Camden County Court, was affirmed by the New Jersey Supreme Court. *State v. Johnson*, 31 N. J. 489, 158 A. 2d 11 (1960).

Thereafter, on a motion for a new trial, the trial court heard evidence on a claim that the confessions used at the trial had been coerced and filed an opinion denying the motion. *State v. Johnson*, 63 N. J. Super. 1c, 163 A. 2d 593 (1960). This judgment was affirmed, *State v. Johnson*, 34 N. J. 212, 168 A. 2d 1, *cert. den.* 368 U. S. 933 (1961).

Subsequently, a federal petition for writ of habeas corpus, alleging *inter alia*, that the confession used at the trial had been coerced, was denied (Joint-Appendix, Vol. I, page 40a).

On appeal, the United States Court of Appeals for the Third Circuit reversed and remanded to the District Court, with instructions to grant the writ of habeas corpus without prejudice, to the right of the State to try defendant again.

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals, in concluding defendant's confession was involuntary, considered psychiatric examinations of defendant and other matters dehors the record.

Of especial significance to the Court of Appeals were Godfrey's psychic inadequacies which apparently manifested themselves in the form of narcotics. The Court of Appeals finds as a fact that "on the Motion for a New Trial, it was established that Godfrey had been examined by a psychiatrist employed by the State of New Jersey," and then states the contents of the psychiatrist's report and makes findings of important facts based thereon. In this the court erred. The only place we find that Godfrey was examined by a psychiatrist is in the affidavit of a Mr. Steven Sieverts filed as part of the Motion for New Trial in the State proceeding. This fact was not proven at the hearing on the Motion. The court further erred in assuming that the psychiatrist's examination there referred to, is the same as those reports attached to, and forming part of, the Petition for Habeas Corpus (35a to 37a). This is not so. The psychiatrist's report of the examination last mentioned, and upon which the Court of Appeals relied, was made on July 5, 1959, while the defendant was in the death house following his conviction. Again, the court relies upon, and quotes from, the psychiatric report of his examination of defendant. This report was made on March 30, 1960, after the defendant had been in the death house for fourteen months, after conviction and after his appeals to the State Supreme Court and the United States Supreme Court had been rejected. These reports were never proven in court. By this we mean that the experts were not pro-

duced for examination and the State was denied cross-examination. The State objected to the use of these reports merely by attaching them to a Petition and then using their contents without proving them in the usual fashion. If the proper procedure had been followed, it could be established what, if any, weight should be accorded to them. We then could have found out what psychological transitions occur to a defendant in the death house for such a period of time, particularly after his hopes for victory by appeal appear lost.

Defendant's mental state, indicated in these psychological and psychiatric evaluations, was never related to a period surrounding defendant's interrogation—the period with which we are concerned. In this posture of the proofs, it was error for the court to rely on cases such as *Fikes v. Alabama*, 352 U. S. 191 (1957); *Watts v. Indiana*, 338 U. S. 49 (1949) and *Turner v. Pennsylvania*, 338 U. S. 62 (1949). Nor are we dealing with a youthful offender, which would make *Haley v. Ohio*, 332 U. S. 596 (1948), apposite.

While all relevant circumstances must be considered in determining the admissibility of the confession, the ultimate question is whether the defendant's will was overborne and his capacity for self-determination seriously impaired. *Culombe v. Conn*, 367 U. S. 568 (1961). This test governs regardless of the method of coercion, be it physical violence or psychological pressure and is equally applicable to a drug-induced statement. *Townsend v. Sain*, 372 U. S. 293 (1963). It is well established that a confession of crime which is proved to have been made by one under the influence of drugs or narcotics is not *ipso facto* inadmissible in evidence. See Annotation, "Use or administration of drugs or narcotics as affecting admissibility of confession," 69 A. L. R. 2d 384 (1960). It is manifest that any holding of the inadmissibility of a confession because of drug or narcotic influence acting upon the person by

whom the confession was made, requires, as a logical foundation, proof that at the time he confessed the defendant was actually so influenced. We believe it was error for the Court of Appeals to characterize in its Opinion as "undisputed," Godfrey's testimony of his use of narcotics when this story was first told in May, 1960, over sixteen months after the trial, and over two years and four months after the alleged incidents, and which, by Godfrey's own admission, was never told to his trial attorney.

How does one dispute, on May 24, 1960, the allegations of Wayne Godfrey concerning drugs, when this is the first time it had been mentioned when the use of drugs allegedly took place on January 24 and 28, 1958? Nowhere is it shown that defendant was not in full command of his senses at the time of his confession.

On the record before the Court of Appeals, there was no justification, legally, psychiatrically or psychologically, to equate the personality of Godfrey, a year and a half after conviction, with the man who was arrested and interrogated on January 28 and 29, 1958.

II. Whether the Court of Appeals gave undue weight to the testimony of defendant and came to conclusions unjustified in the inadequate record before it.

A careful review of Godfrey's testimony (294a-336a) indicates that his complaint related to the confession given Chief Dube. Even at the hearing on the Motion for New Trial, based on newly-discovered evidence in May of 1960, counsel then representing Godfrey did not consider it meritorious to contend that what transpired at police headquarters prior to defendant's confession, resulted in a coerced confession. The high caliber of defendant's counsel cannot be disputed, for it was he who subsequent to the

State's denial of inspection of his client's confession, appealed to the Supreme Court of New Jersey, changing the law of this State by permitting pre-trial examination by defendant of his confession.

Unfortunately, the lower court misconstrued Godfrey's testimony which, on analysis, makes no real criticism as to what happened at the time now complained of. On May 24, 1960, Godfrey testified that his statement to Chief Dube was true, except for the robbery (295a). Godfrey denied speaking to Noah Hamilton, yet Noah Hamilton testified as to the conversation at the main trial (not reported in the record before this court), and Godfrey told the psychiatrist, on February 3, 1958, of his conversation with Hamilton.

Godfrey begins the attack of his confession on page 307a through 310a. Here his only complaint concerns the statements to Chief Dube. This complaint is patently false. He denied being under oath and suggests that a certified court stenographer would participate in faking a record in order to convict Godfrey. Mr. Albert took down everything that was said and read the questions and answers back to Godfrey alone. No one questioned Mr. Albert, for all trial and defense counsel knew and respected him. Godfrey's direct examination ended and only after vigorous cross-examination did he next complain, at 319a, of no rest and being bruised and hitten (sic).

The next evidence of Godfrey's condition is at 323a. Again, in cross-examination by the Prosecutor, in answer to the question as to the length of time the confession took, he answered, "I don't know how long it took, I know it was tiresome to me and I had no rest or nothing, no sleep or nothing." These are the only complaints of Godfrey concerning the interrogation. The balance of his testimony, both on direct and cross, is a repudiation of the questions and answers in his confession. Godfrey doesn't complain about a persistent, all-night interrogation. Godfrey does

not tell how long he was questioned and when he was questioned.

The Court of Appeals has unjustifiably taken the testimony of the State's witnesses at the original trial and turned intermittent questioning into persistent grilling—without any basis or justification in the record. The Court of Appeals further says the police officers who obtained his informal confession, were present as silent spectators while Chief Dube took his formal confession. This is not substantiated in the record.

The Court of Appeals makes a further finding of fact which is based upon an assumption that the defendant confessed to a story of "armed robbery" because he "understood that the ordeal of the last 21 hours would not be ended until he should repeat in a formal way what he had told the interrogating police officers. Thus, the final questioning by Chief Dube was a culmination of pressure rather than a release from pressure." This assumption by the Court is not supported by the record before it or in any other record. Godfrey never so testified nor so contended. There is no basis in fact to the statement that what he confessed to Chief Dube he had previously told the police officers. As a matter of fact, if given the opportunity the State will show that what he previously told the police officers was totally different.

The Court of Appeals has overly emphasized the preliminary statement by Chief Dube when he said, "I want to ask you what you know about that hold-up." The court has ignored that in the same breath Chief Dube had told him that in the course of the hold-up a man by the name of Edward Davis was shot and as a result of that shooting he died a short time later.

The Court of Appeals further ignored the fact that almost at the outset of the confession the defendant for the first time said:

". . . I parked the car and they went around to the place and they came back, so I asked them what was the matter—I said, 'Come on, let's go,' and they said, 'No, we are going back and get the place,' so they both went back . . .".

Not to be overlooked, is the important item that at the hearing Godfrey testified that Cassidy and Johnson went there to collect a debt (298a, 299a, 301a), and then completely lied by stating that when he parked the car, Cassidy and Johnson left and Cassidy came back alone and told him that Johnson had shot a man (301a-302a). In this version he was willing to overlook the important fact that Cassidy and Johnson had previously returned to the car and then went back to the Davis store to "get the place." Without any showing, and we say there is no such showing, and to the contrary charge that the defendant never previously so stated to the police officers, we respectfully submit that the court was not justified in finding that the defendant's confession was involuntary.

The Court of Appeals erred in concluding from the fact that during the 21 hours of detention defendant was not taken before a magistrate or allowed access to counsel, his confession was involuntary. The fact that the defendant was over-detained before arraignment in a State proceeding does not invalidate the confession obtained in the interim, *Lisenba v. California*, 314 U. S. 219 (1941); *Culombe v. Conn.*, 367 U. S. 568 (1961). The United States Supreme Court has failed to extend the exclusionary rule of *McNabb v. U. S.*, 318 U. S. 332 (1943), to state criminal cases. New Jersey has repeatedly declined to follow *McNabb*. *State v. LaPierre*, 39 N. J. 156, 188 A. 2d 10 (1963); *State v. Smith*, 32 N. J. 501, 161 A. 2d 543 (1960), *cert. den.* 364 U. S. 936 (1961); *State v. Wise*, 19 N. J. 59, 84, 115 A. 2d 62 (1955); *State v. Pierce*, 4 N. J. 252, 263, 72 A. 2d 305

(1956). New Jersey finds nothing which suggests the federal doctrine of exclusion for delay in arraignment is of constitutional stature and applicable to the states. It merely remains an exercise of the supervisory authority of the United States Supreme Court over the administration of justice in the federal courts. *State v. LaPierre*, supra. The fact that the defendant has been denied consultation with an attorney has been held by the United States Supreme Court not in itself to be controlling on whether the confession was voluntary. *Cicenia v. Lagay*, 357 U. S. 504 (1958); *Crooker v. California*, 357 U. S. 433 (1958).

If law enforcement officers are to have fair opportunity to interrogate witnesses and suspects as is conceded by the majority in *Haynes v. Washington*, 373 U. S. 503 (1963), then when and for how long shall it continue. We are not suggesting that this can be measured by a time clock. We would rest on the test laid down by the United States Supreme Court namely, "the will of the accused is so overborne at the time of confession that his statement is not the product of a rational intellect and a free will." *Reck v. Pote*, 367 U. S. 433, 440 (1961); *Culombe v. Conn.*, supra. To make this test meaningful, it must be applied realistically and not in a vacuum. Before a confession should be invalidated there ought to be a substantial showing in a timely proceeding. Where the original trial court had the opportunity of hearing a complaint 16 months after the original trial and rejected the witnesses as unbelievable it should not be dismissed lightly. *Brady v. Maryland*, —— U. S. ——, 10 L. Ed. 215.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted. In the alternative this cause should be referred to the District Court for further hearing and taking of testimony. *Townsend v. Sain*, supra.

Respectfully submitted,

NORMAN HEINE,
Counsel for Petitioner.

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October Term, 1963.

No. 1018.

STATE OF NEW JERSEY,
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vs.

WAYNE GODFREY,
Respondent.

Appendix

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UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 14,187.

UNITED STATES OF AMERICA, ex rel.
SYLVESTER JOHNSON,
Appellant.

v.

HOWARD YEAGER, Principal Keeper of the
New Jersey State Prison.

No. 14,188.

UNITED STATES OF AMERICA, ex rel.
STANLEY CASSIDY,
Appellant.

v.

HOWARD YEAGER, Principal Keeper of the
New Jersey State Prison.

No. 14,189.

UNITED STATES OF AMERICA, ex rel.
WAYNE GODFREY,
Appellant.

v.

HOWARD YEAGER, Principal Keeper of the
New Jersey State Prison.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY.

Argued April 24, 1963.

Before: KALODNER, HASTIE and GANEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 17, 1963.)

By HASTIE, Circuit Judge.

Three New Jersey state prisoners, under sentence of death for first-degree murder, have taken these appeals from an order of the United States District Court for the District of New Jersey denying their petition for habeas corpus.[1] The principal contention of the appellants is that due process of law has been denied them because confessions which do not satisfy the constitutional standard of voluntariness were used as evidence against them at their trial. The district court resolved this issue against the appellants on the basis of the evidence that was before the New Jersey courts. On this appeal we shall consider only those facts which have been found judicially or cannot reasonably be disputed in the light of the showing in the record.

At the trial the prosecution undertook to prove that the three appellants drove in appellant Godfrey's car to a store operated by the decedent, with a common purpose to commit robbery; that Godfrey remained in the car while the other two entered the store; and that in the course of the attempted robbery Johnson fatally shot the storekeeper.

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[1] The original convictions in the Camden County Court were affirmed by the New Jersey Supreme Court. **State v. Johnson**, 31 N. J. 489, 158 A. 2d 11 (1960). Thereafter, on motion for a new trial, the trial court heard evidence on a claim that the confessions used at the trial had been coerced and filed an opinion denying the motion. **State v. Johnson**, 63 N. J. Super. 16, 163 A. 2d 593 (1960). This judgment was affirmed, **State v. Johnson**, 34 N. J. 272, 168 A. 2d 1 (1961), and certiorari denied, 368 U. S. 933. This federal habeas corpus petition followed.

Thus, under the prosecution's case, as presented, it was essential to a conviction of first-degree murder that robbery be established as the objective of the enterprise. All three appellants had signed confessions admitting that their purpose was to rob the storekeeper.[2] These confessions were essential items of proof on this issue.

In this habeas corpus proceeding, the appellants, who do not deny the killing, contend that they were coerced into admitting that they were engaged in robbery, when in fact their purpose in going to the store was to collect a debt owed by the storekeeper to appellant Johnson.

None of the appellants testified at the trial, either as to the manner in which the confessions were obtained or for any other purpose. The only testimony given at the trial concerning the confessions was that of the officers and stenographers who were present during the initial detention and interrogation of the prisoners or when the formal statements of the prisoners were made and transcribed. The appellants did testify, more than a year later, at a hearing on their motion for a new trial. The New Jersey courts have considered this testimony on the issue of alleged coercion, and it was properly considered by the district court in this habeas corpus proceeding.

On the record thus made, important differences in the circumstances of the three confessions appear. Accordingly we shall discuss matters relevant to each confession separately.

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[2] In the subsequent hearing on the motion for a new trial, each testified that he had wished to take the stand but that he had been dissuaded by his lawyer. The New Jersey Supreme Court held that counsel's action was an entirely proper exercise of professional judgment. 31 N. J. 212, 223, 168 A. 2d 1, 6.

WAYNE GODFREY.

The killing took place on Friday, January 24, 1958, at about 6:10 P. M. Godfrey was arrested at about 1:30 the following Tuesday afternoon. He was taken to detective headquarters in the Camden courthouse, where he remained until 10:30 Wednesday morning, when he was taken to the office of the Chief of Detectives for the transcription of a formal confession. There, in answer to questions put to him by Detective Chief Dube, he made the confession which was later introduced into evidence.

Throughout the case, the New Jersey courts have emphasized, as appellee does here, that on the occasion of this formal confession Godfrey was treated civilly and interrogated in a proper and polite manner. On that occasion the prisoner was submissive, talking freely and without necessity for any great urging. If only the occurrences in the office of Chief Dube are considered, the confession appears to be voluntary. However, for reasons to be elaborated later, we think this restricted view of the matter in issue has unduly influenced the entire judicial consideration of the claim that the confession was coerced. The events preceding the formal confession must be considered as well as its immediately attendant circumstances.

The testimony of police officers, given at the trial, concerning the 20-hour period immediately preceding Godfrey's formal confession was sketchy, but nevertheless revealing. It was admitted that the prisoner spent this whole period, including the entire night, in a room at the detective bureau in the Camden courthouse where he was detained and questioned.

Little appears concerning the first few hours of detention. The police testified that they took the prisoner after his arrest to a room in the detective bureau where all of

his clothes were removed. Subsequently he was given coveralls obtained from the city jail. The police officers did not say how long the prisoner remained naked before coveralls were obtained. At the subsequent hearing Godfrey testified that he had remained naked about an hour. There was no testimony to the contrary. Finally, a police captain testified at the trial that "when he (Godfrey) was first arrested he was asked some questions by some members of the City Detective Bureau".

The police were more informative as to events beginning about 8:00 P. M. and continuing through the night until 10:30 the following morning. Almost all of this time was spent in the conference room of the detective bureau. Questioning by relays of police officers, seven of whom are identified in the record, continued intermittently throughout the night and into the next morning until the desired confession was obtained. Most of the time the prisoner was kept sitting in a chair. At no time during the night was he given an opportunity to lie down. One officer had no recollection of the prisoner sleeping. Another remembered that the prisoner would doze off and be aroused by further questioning. Another remembered that the prisoner drank much coffee. It was in mid-morning, at the end of this phase of interrogation, that the prisoner was taken before Chief Dube for the formal confession which proceeded smoothly and without apparent reluctance on Godfrey's part.

With this much in the record, Godfrey's counsel objected "to the admission in evidence of the confession . . . on the basis that it was taken after a prolonged period of interrogation from 1:30 Tuesday afternoon, January 28, 1958, until sometime after eleven o'clock, January 29, 1958, the following day". The court ruled, however, that Godfrey's confession was voluntary and admitted it.

At the hearing on the appellant's motion for a new trial,

it was established that Godfrey had been examined by a psychiatrist employed by the State of New Jersey. The psychiatrist found that Godfrey, a 27-year-old laborer with a seventh grade education, was "an inadequate individual with impaired psychological conditioning". Moreover, a special psychological examination, also made by a state expert, revealed "a rather disturbed individual who has definite schizoid tendencies". Godfrey himself gave undisputed testimony that he was a regular user of marijuana and an occasional user of heroin. He also testified that throughout the morning of his arrest, and thus only a few hours before interrogation began, he had been smoking marijuana cigarettes.

The total picture is illuminated by the conduct of the police in denying Godfrey access to friends, counsel or a magistrate until the interrogation had produced a full confession. New Jersey law requires that an arrested person be taken promptly before a magistrate. N. J. Rules 2:3-3(a). Godfrey testified, and the police have not denied, that during the course of his detention he asked without avail for counsel. Such behavior by the police strongly indicates a determination to keep the prisoner under pressure of interrogation until the desired admissions have been obtained. See *Haynes v. Washington*, May 27, 1963, —— U. S. ——, 31 U. S. L. Week 4402.

The total picture of what happened to Godfrey must be evaluated in the light of the substantial body of Supreme Court decisions concerning confessions induced by coercive tactics short of physical violence. It is clear that illegal detention of a suspect for a long time without taking him before a magistrate does not in itself compel the conclusion that a confession obtained during that period has been coerced. *Stein v. New York*, 346 U. S. 156, 186-88 (1953); *Stroble v. California*, 343 U. S. 181, 196-97 (1952). But in-

terrogation during such detention may be so prolonged, insistent and exhausting that the resultant confession must be deemed the product of coercion rather than free choice. *Ashcraft v. Tennessee*, 322 U. S. 143 (1944). Ashcraft had been questioned, without opportunity for rest, by relays of officers for 36 hours. Though he was a mature, self-possessed, 45-year-old businessman without any significant weakness or susceptibility to overreaching, the Supreme Court concluded that a confession produced by such long and exhausting interrogation must be deemed involuntary. It is arguable that any interrogation like that to which Godfrey was subjected in this case—from late afternoon or early evening, all through the night and well into the next morning—should be deemed intolerably coercive, even to a self-possessed man of strong will, as was the 36-hour questioning of Ashcraft. However, we need not go that far. Other cases make it clear that factors in addition to the length of the period of interrogation are relevant and often controlling.

In *Haley v. Ohio*, 332 U. S. 596 (1948), the suspect was a 15-year-old boy whose immaturity made him more susceptible than an adult to the pressure of persistent interrogation by officers of the law. The police began questioning young Haley at midnight and continued until they obtained the desired confession at 5:00 A. M. The inevitable coercive effect of that much interrogation at that time of night upon a 15-year-old boy was held to be sufficient to make his confession involuntary.

In *Spano v. New York*, 360 U. S. 315 (1959), a 25-year-old man with a history of emotional instability was questioned from 7:15 P. M. until he confessed at 3:25 A. M. In finding that the confession drawn from this man after an eight-hour grilling was not voluntary, the court empha-

sized the inevitable effect of fatigue as interrogation continued through the late hours of the night.[3]

Other cases have involved repeated questioning for individual periods of a few hours each over five or six days until the prisoner has confessed. When such pressure has been used upon a prisoner shown to be unstable or otherwise susceptible to overreaching, the Supreme Court has not hesitated to find the resultant confession involuntary. *Fikes v. Alabama*, 352 U. S. 191 (1957); *Watts v. Indiana*, 338 U. S. 49 (1949); *Turner v. Pennsylvania*, 338 U. S. 62 (1949).

We think this entire body of decisions leaves little doubt about the proper characterization of Godfrey's confession. The inference of coercion from exhausting interrogation throughout a sleepless night and into the following day is in itself very strong. When we add the testimony of disinterested state-employed experts as to Godfrey's psychic inadequacy, Godfrey's own unrefuted testimony of his regular use of drugs and his smoking of marijuana a few hours before interrogation began, and the refusal of the police during the 21-hour period of detention and interrogation to take the prisoner before a magistrate or to allow him access to counsel, we cannot avoid the conclusion that the prisoner's ultimate admission that he had gone to the decedent's store for the purpose of committing robbery was not made voluntarily.

In reaching a contrary conclusion, the courts of New Jersey seem to have reasoned that the civil manner in which Detective Chief Dube questioned Godfrey at 10:30

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[3] In an entirely different context, the coercive effect of fatigue when rest is denied throughout the night has been recognized in this circuit. In **United States, ex rel. Lequillou v. Davis**, D. V. I. 1953, 115 F. Supp. 392, **rev'd on other grounds**, 3d Cir. 1954, 212 F. 2d 681, a jury had been required to hear a criminal case all day and then to deliberate all night until a verdict of guilty was returned at 6:00 A. M. This verdict was held to have been coerced and to represent a denial of due process of law.

Wednesday morning and the prisoner's submissiveness at that time cured or made irrelevant the events of the preceding 21 hours. However, the Supreme Court has pointed out more than once that precedent coercion may have a persisting invalidating effect upon a confession given without apparent reluctance in response to civil questioning in pleasant surroundings. See, *e.g.*, *Brown v. Mississippi*, 297 U. S. 278 (1936); *Reck v. Pate*, 367 U. S. 433, 444 (1961).

In this case, despite the propriety of Detective Chief Dube's interrogation, several circumstances affirmatively indicate that the pressures which induced the preceding informal admissions continued.

Weariness to the point of exhaustion is cumulative. The prisoner was still without sleep or rest after the nightlong interrogation when he was taken to Chief Dube's office. The very police officers who had obtained his informal confession were present as silent spectators while Chief Dube conducted the interrogation. Chief Dube, though civil and careful to admonish the prisoner to tell the truth, never indicated in any way that the prisoner was free to remain silent. To the contrary, he indicated from the outset that he was expecting the prisoner to relate a story of armed robbery. Thus, he began his interrogation by saying, "I want to ask you what you know about that hold-up." We think the prisoner must have understood that the ordeal of the last 21 hours would not be ended until he should repeat in a formal way what he had already told the interrogating police officers. Thus, the final questioning by Chief Dube was a culmination of pressure rather than a release from pressure. The answers given in response to his questioning cannot be said to have been voluntary.

STANLEY CASSIDY.

Police officers went to Cassidy's home at 4:00 A. M. on Wednesday following the killing, awakened him, placed him under arrest, and took him to detective headquarters. During the next 20 hours, Cassidy made three formal statements to Detective Chief Dube which were admitted in evidence at the trial. As in the case of Godfrey, there is no doubt that the questioning of Cassidy in Detective Chief Dube's office was conducted in a civil manner. Once again, however, it is argued that events preceding these formal statements prevented them from being voluntary.

Five hours elapsed between Cassidy's arrest and the beginning of his first formal statement. During that period, he was questioned by several detectives. The intensity of the interrogation does not appear in the testimony of the officers at the trial. Cassidy's testimony at the hearing on the motion for a new trial, that he was questioned continuously from the time he was arrested until he was taken to Detective Chief Dube's office at 9 A. M., has not been denied. However, his testimony that he was physically abused—specifically, that one of his interrogators angrily threw a book at him—was disputed by testimony, and the court which heard this testimony chose to disbelieve Cassidy, relying to a substantial extent on the fact that he had waited more than a year after the event before mentioning the alleged abuse. We think that this was an allowable evaluation of the testimony which is adequately supported by the record. The district court was within its discretion in refusing to treat this case as one in which physical violence has been established. We accept that determination.

In view of the paucity of the available evidence concerning the interrogation which preceded Cassidy's first formal

statement, his characterization of that statement as coerced perforce depends greatly upon his own testimony that he was a "heavy user of narcotics", especially marijuana, and upon statements of state-employed psychiatrists and psychologists concerning Cassidy's mental condition. Cassidy was 25 years old at the time of the crime. He had an eighth grade education. In one psychologist's report he is described as "an extremely inadequate, regressed, passive individual." A psychiatric report describes him as a "highly conflicted, immature, individual" with "deep feelings of incompetence." He is also characterized as "an inadequate personality who needed narcotics to alleviate his present anxieties."

We recognize that such a person is likely to be less able than the average individual to withstand insistent and protracted grilling by the police. On the evidence adduced at trial, as supplemented by the showing made in support of the motion for a new trial, the district court might have found that Cassidy's first statement was the product of coercion. But we cannot say that such a conclusion was rationally unavoidable. Certainly the prisoner was not subjected to more than four hours of questioning, probably less, during the early morning detention which preceded his first full confession. The record simply does not yield an unmistakable picture of a man exhausted or overcome by an ordeal at that time.

Cassidy's first statement was a comprehensive admission of guilt. In it he acknowledged that the purpose of going to the decedent's store had been to "get some money" by force and that Johnson had shot the decedent in the course of carrying out that purpose. It is true Cassidy persistently denied that they had intended to accomplish their purpose by the use of firearms. Thus, he denied that he, himself, had taken a gun to the decedent's store, and he disclaimed any knowledge preceding the killing that John-

son had a gun. His stated reaction when the shooting occurred was that "I didn't know he had a pistol, it was just supposed to be a strong-arm job". Nevertheless, the facts admitted in the first statement disclosed the essential elements of murder in the course of robbery.

It is difficult to understand what proper purpose the police were pursuing when they continued to interrogate Cassidy after his first statement instead of taking him without further delay before a magistrate for a preliminary judicial hearing. In the absence of explanation, the natural inference is that the police, not satisfied with the strong evidence which had already been elicited, were determined to press the prisoner until his account of the crime under investigation should become impressively elaborate. Such determination has marked many cases in which the Supreme Court has upset state convictions obtained through the use of confessions, for it evinces the kind of coercive atmosphere in which otherwise constitutionally innocuous improprieties may assume a threatening quality. See *Haynes v. Washington*, supra; *Gallegos v. Colorado*, 370 U. S. 49 (1962); *Malinski v. New York*, 324 U. S. 401 (1945); *cf. Spano v. New York*, supra, at 323-24. It is our duty to scrutinize the circumstances pertaining to the second and third confessions closely.

Two hours after his first statement, Cassidy was taken to Detective Chief Dube's office again, and there made the second statement. In it he confessed, in contradiction of his first statement, that he had taken a pistol on the expedition which resulted in the killing. The damaging inference of felonious purpose is obvious. The only testimony at the trial concerning the period between the first and second statements was that of Chief Dube, who could say no more than that "after he (Cassidy) had made (sic) the first interrogation, and the answers were read back to him, ending around 10:25, he was taken out of the room. . . . I

presume that he was taken in one of the other rooms in the Prosecutor's office where he was kept until I talked to him later at 12:15". The only evidence of any improper conduct during this two-hour interval appears in Cassidy's testimony at the hearing on motion for a new trial, where he testified as follows:

> "I remember when I made my first confession I told Chief Dube that I didn't have the gun and the Prosecutor came and got me and asked me did I have a gun at home at all. I said no at first because the gun did not belong to me. He said, 'well, look, if you have a gun at home, all we want to do is check it, (to) see if it has been fired'. He said 'We won't use this as evidence against you if it hasn't been fired.'"

If the Prosecutor did give the prisoner this assurance, it is arguable that the rules of evidence should exclude an admission thus obtained in exchange for a promise of favorable treatment. See *Shotwell Mfg. Co. v. United States*, 371 U. S. 341, 348 (1963), (dictum), (federal prosecution); *Crawford v. United States*, 5th Cir. 1955, 219 F. 2d 207, (semble) (federal prosecution). See generally *Bram v. United States*, 168 U. S. 532 (1897), (federal prosecution); *Maguire, Evidence of Guilt* (1959), p. 139. But such a bargain is an improper means of persuasion rather than a device of compulsion. It may produce a statement that is untrustworthy because a suspect may be induced to incriminate himself falsely when he is led to believe that, all things considered, he will gain thereby. But bargaining for a confession is not shocking and outrageous in the way that third degree methods are. Probably for this reason, courts have not heretofore made the rule which excludes testimony induced by promise of favor a constitutional mandate. Cassidy did not assign as a basis for his motion for a

new trial or as a ground for federal habeas corpus that his admissions concerning his gun had been induced by a promise not to use this evidence against him. Thus, no ruling in this regard is presented for appellate review. In thus disposing of the matter, we do not hold or imply that a finding of such inducement would entitle the prisoner to relief on constitutional grounds.

Little can be added concerning the third statement, taken eleven hours later, in which Cassidy substantially discredited his earlier protestations of ignorance before the shooting that Johnson had a pistol. All we know about that statement and the events which preceded it is that Detective Chief Dube could testify only that he believed Cassidy "had been placed in the detention room in the Detective Bureau, where he was told to rest or do whatever he chose to do until I next asked for him that evening". The only constitutional objection which could be made to the use of the third statement would be that the coercive effect of official conduct preceding the earlier statements had influenced the third statement as well. See *Reck v. Pate*, supra, at 444. But we already have concluded that the evidence concerning the earlier statements does not require a finding that they were coerced.

SYLVESTER JOHNSON

Johnson, who admittedly fired the fatal shot, also made a full confession and contends that his admission of an attempted armed robbery was coerced.

Johnson was apprehended in Newark the day after the arrest of the other appellants. He was taken into custody at 5:00 P. M. and was promptly taken before a magistrate in Newark. Thereafter, he was detained in Newark until 2:00 A. M. when Camden police officers removed him by

automobile to Camden. Shortly after arrival, he was taken to Detective Chief Dube's office and at 4:45 A. M. readily made the confession which was later introduced in evidence. At the hearing on the motion for a new trial, Johnson testified that police officers struck him, both in Newark and during the drive from Newark to Camden. As in the case of Cassidy, this testimony was disputed, and the court which heard it disbelieved it. We accept that determination.

There was no evidence of more than routine questioning in Newark and no indication that it was long-continued. Similarly, there was no evidence of—indeed, no time for—any substantial interrogation in Camden between arrival and the formal confession in Chief Dube's office. It is clear that Johnson was questioned during the automobile ride from Newark to Camden. But, once the testimony of physical violence is discredited, we cannot say that either the nature of the interrogation or its duration made the experience grueling.

Here again, recognizing that the record does not establish a long continued and exhausting grilling, the appellant emphasizes the state's own psychiatrist's report concerning him. Johnson, who had a seventh grade education, was 21 years old at the time of the killing. A state psychologist reported of him that "the impression of the examiner at the present time is that this is an insecure, grossly inadequate, poorly integrated schizoid personality whose stability and judgment goes to pieces under douress [sic] and stress". A psychiatrist found that the prisoner exhibited "intense feelings of insecurity and inadequacy which were conspicuous throughout his entire life". But, taking this instability and inadequacy of personality into account, we think the kind and amount of pressure established in this record is not enough to compel a conclusion that Johnson's confession was not voluntary. Therefore, we cannot find

a denial of due process in the state's use of Johnson's confession as evidence against him.

Finding only Godfrey's confession to have been involuntary on the record before us, we have considered whether the admission of that confession itself affected the constitutional rights of Cassidy and Johnson. The introduction of a coerced confession in evidence against one defendant is not in itself the imposition of constitutional wrong upon his co-defendant. *Stein v. New York*, supra, at 194-96; *Malinski v. New York*, supra, at 410-12. The jury was instructed to consider each confession as evidence against its maker only. And here we have the additional consideration that substantially the same information was placed before the jury in the confessions of Cassidy and Johnson as in the confession of Godfrey. In these circumstances, we think it is not reasonable to believe that the jury would or, indeed, had any occasion to go beyond Cassidy's and Johnson's own confessions and use similar statements in Godfrey's confession against them.

For these reasons the judgment will be reversed as to Godfrey and remanded to the district court with instructions to grant the writ without prejudice to the right of the state to try him again. As it affects Cassidy and Johnson, the judgment will be affirmed.

A true copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT

(Filed July 17, 1963.)

This cause came on to be heard on the record from the United States District Court for the ——— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of August 8, 1962, filed August 15, 1962, of the said District Court in this case be, and the same is hereby reversed as to Godfrey and the cause is remanded to the district court with instructions to grant the w... without prejudice to the right of the state to try him again.

Attest:
IDA O. CRESKOFF
Clerk

July 17, 1963

ORDER DENYING REHEARING

SUR-PETITION FOR REHEARING.

Present: BIGGS, Chief Judge; and McLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY and SMITH, Circuit Judges.

The petition for rehearing filed by Howard Yeagers in the above entitled case having been submitted to the judges

who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ WILLIAM H. HASTIE,
Judge.

Dated: January 24, 1964.

Office Supreme Court, U.S.
FILED
MAY
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1015

No. 1322 Misc.

UNITED STATES OF AMERICA, ex rel., SYLVESTER JOHNSON and STANLEY CASSIDY,

Petitioners,

vs.

HOWARD YEAGER, Principal Keeper of the New Jersey State Prison,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

NORMAN HEINE,
Camden County Prosecutor,
Court House,
Camden, New Jersey

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

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ARGUMENT.

I.

The petitioners' confessions were voluntary.

At the original trial, the State discharged its burden of proving the petitioners' confessions to have been made voluntarily. Before the confessions were admitted into evidence, the jury was excused and the trial judge conducted a preliminary investigation into their voluntariness (126a-128a).* *State v. Smith*, 32 N. J. 501, 557, 161 A. 2d (1960), cert. den. 364 U. S. 936 (1961).

All of the officers who were present at the interrogation were put on the stand by the State and cross-examined by the three defense counsel (Dube, 157a-162a; Neale, 163a-172a; Conley, 172a-177a; Large, 177a-180a; Large, 181a-189a). Defense counsel probed at length into the method of interrogation, the condition of defendants and their treatment prior to, and during, the transcribing of their statements. Cross-examination failed to elicit any evidence tending to show the confessions involuntary. On the contrary, the evidence showed that defendants were carefully informed of their rights, considerately treated and were asked questions to which they often gave long, narrative responses. These confessions were given in the presence of and transcribed verbatim by the official court stenographer, who corroborated the testimony of the police officers that the defendants were not intimidated, nor mistreated in any manner. These facts were found by the

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* Page numbers refer to Joint Appendix (two volumes) filed with the Court below, nine copies of which have been filed with the court by petitioner.

New Jersey Supreme Court, 34 N. J. 224, 168 A. 2d 7, and the U. S. District Court (48a-68a).

This court has recognized that the findings of a State Court are to be given due regard. *Culombe v. Connecticut*, 367 U. S. 568 (1961). Whether the due process clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession requires an independent determination, and while this Court is not completely bound by State Court determinations of any issue essential to the decision of a claim of Federal right, nevertheless, "as State Courts are charged with the primary responsibility of protecting basic and essential rights, we accord an appropriate and substantial effect to their resolutions of conflict in evidence as to the occurrence or nonoccurrence of factual events and happenings. This is particularly apposite because the trial judge and jury are closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony." *Haynes v. Washington*, 373 U. S. 503 (1963).

The defendants neither took the stand, nor offered any evidence by others in support of their claim that their confessions were obtained through intimidation, physical violence or mental coercion. After the examination of State witnesses who were present at each interrogation, the Court asked each defendant if he desired to offer any testimony or evidence relating to the involuntariness of his confession. Each defendant, after consulting with his counsel, declined to take the stand or offer any evidence in his behalf. (As to Cassidy, 153a; as to Johnson, 220a.)

After the trial judge found all of the confessions voluntary, and therefore admissible, the prosecutor said he assumed that the testimony given in the hearing on admissibility would be re-introduced in the presence of the jury. All three counsel for the defendants announced that they were "satisfied not to go through it again," and agreed that

the confessions be read to the jury without any testimony at all on the issue of voluntariness. 31 N. J. 489, 507, 158 A. 2d 11, 21 (1960).

It is significant to note the observation of the New Jersey Supreme Court, 34 N. J. 224, 168 A. 2d 7, that:

> "On the appeal following defendants' convictions, they did not dispute the trial court's finding of voluntariness."

Notwithstanding, a year and a half passed after the original trial before the defendants decided to take the stand and offer evidence to dispute the voluntariness of their confessions.

While it may be true that Cassidy was arrested at 4:00 A. M. on Wednesday morning, January 29th, and was not given a preliminary hearing until Friday, January 31st, his long, narrative confession began only five hours subsequent to his arrest.

Defendant, Johnson, was arrested in Newark, New Jersey, on January 29th, at approximately 5:00 P. M. He was taken to the Newark Police Bureau, where he remained until night court was held and, after he was given a preliminary hearing, he was placed in jail until approximately 2:00 A. M., when the local police received a call to bring him to Camden, where they arrived between 4:00 and 5:00 A. M. His claim of having been hit several times in Newark and during his drive to Camden, was first revealed at the hearing a year and a half after the original trial. No intimation of this kind of treatment was developed, or even suggested, during the cross-examination of the arresting officers (Conley, 103a-116a; O'Brien, 117a-118a). After his attorney conferred with Johnson, he stated, ". . . there would be no useful purpose served in putting the defend-

ant on the stand" (J402a). The United States District Court, after reviewing all the testimony produced, both at the original trial and at the hearing on the application for a new trial, chose to discredit Johnson's testimony of physical violence.

The United States Supreme Court has declared that the Federal doctrine of exclusion for delay in arraignment is not of constitutional stature and is not applicable to the various states. It remains an exercise of the supervisory authority of the United States Supreme Court in the administration of justice in the Federal courts. *McNabb v. United States*, 318 U. S. 332 (1943). The *McNabb* Rule is a rule of evidence for criminal trials in the Federal Courts and does not arise from constitutional sources. The New Jersey courts have repeatedly declined to follow the Federal rule. *State v. LaPierre*, 39 N. J. 156, 188 A. 2d 10; *State v. Smith*, supra; *State v. Wise*, 19 N. J. 59, 115 A. 2d 62 (1955); *State v. Pierce*, 4 N. J. 252, 72 A. 2d 305 (1950).

Respondent strenuously objects to the introduction of psychiatric and psychological reports as part of the record in these proceedings. (See respondent's (petitioner's) petition for writ of certiorari, docketed April 18th, No. 1018, page 5, et seq.) Petitioners cannot, through the expedient of annexing physicians' reports to a petition for a writ of habeas corpus (17a-39a), create "undisputed" facts upon which to rely. These reports were never proven in court and the State was denied cross-examination of the psychiatrists and psychologists. Defendants' mental state indicated in these psychological and psychiatric evaluations were never related to a period surrounding defendant's interrogation—the period with which we are concerned.

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*Page numbers prefixed by "J" refer to the Joint Appendix, in three volumes, filed in the Supreme Court of New Jersey on direct appeal from the judgments of conviction.

While all relevant circumstances must be considered in determining the admissibility of the confessions, the ultimate question is whether the defendants' will was overborne and their capacity for self-determination seriously impaired. *Culombe v. Conn.*, 367 U. S. 568 (1961). This test governs regardless of the method of coercion, be it physical violence or psychological pressure and is equally applicable to petitioners' inference of a drug-induced statement. *Townsend v. Sain*, 372 U. S. 293 (1963). It is well established that a confession of crime which is proved to have been made by one under the influence of drugs or narcotics is not ipso facto inadmissible in evidence. See Annotation: "Use or administration of drugs or narcotics as affecting admissibility of confession," 69 A. L. R. 2d 384 (1960). It is manifest that any holding of the inadmissibility of a confession because of drug or narcotic influence acting upon the person by whom the confession was made, requires, as a logical foundation, proof that at the time he confessed the defendant was actually so influenced.

None of petitioners' fanciful claims were advanced until a year and a half after the original trial, after their appeal to the New Jersey Supreme Court was denied, and after their application to the United States Supreme Court for certiorari was denied and they stood at the eve of their scheduled execution. In the light of this we can understand their belated grasping at straws concocted in the death house. Credence should not be given to these concoctions.

As a result of co-defendant, Wayne Godfrey's confession being held to be involuntary, 327 F. 2d 311, petitioners rely on *Ashcraft v. Tenn.*, 322 U. S. 143 (1944), as requiring reversal of their convictions. The mere fact that Wayne Godfrey's confession was found to be involuntary by the Court of Appeals, does not require a reversal and remand of petitioners' case to the State court. *Ashcraft v. Tenn.*

supra, is clearly inapposite. In *Ashcraft* this court remanded and reversed the conviction of defendant Ware, who did not confess, because co-defendant Ashcraft's confession, introduced at their joint trial, was found to be involuntary. The court noted:

> "Ware's conviction was sustained by the Tennessee Supreme Court on the assumption that Ashcraft's confession was properly admitted and his conviction valid. Whether it would have been sustained had the court reached the conclusion we have reached as to Ashcraft, we cannot know. Doubt as to what the State court would have done under the changed circumstances brought about by our reversal of its decision as to Ashcraft is emphasized by the position of the State's representatives in this court."

In the case, *sub judice*, neither the trial court nor the New Jersey Supreme Court based its finding of voluntariness of petitioners' confessions on the assumption that co-defendant, Wayne Godfrey's confession was valid. Both petitioners independently signed written confessions acknowledging their participation in the crime. In *Malinski v. New York*, 324 U. S. 401 (1945), this court, in a similar case, stated:

> "The furtherest we have gone in a comparable case from a State Court is to vacate the judgment against the co-defendant who did not confess and remand the case to the State Court for further consideration. Thus, in Ashcraft v. Tennessee . . . we followed that procedure at the suggestion of the Attorney General of the State, where the judgment against the co-defendant who did not confess was sustained by the State Court on the assumption that the confession which we held to be coerced was properly admitted.

and that the conviction of the defendant who did confess was valid."

II.

The State Courts applied the correct standard in determining whether the defendants' confessions were voluntary.

Appellants argue that the New Jersey courts (trial and Supreme) rejected their contentions that their confessions had been coerced by applying an impermissible standard, to wit: the probable truthfulness of the confessions instead of accepted standard of voluntariness.

They further argue that if this impermissible standard was not applied in whole, it was at least applied in part, contrary to the holding of *Rogers v. Richmond*, 365 U. S. 534 (1961). In support of their argument, they rely upon the following statements found in the opinion of the New Jersey Supreme Court, 34 N. J. 212, 168 A. 2d 1, affirming the decision of the Superior Court in denying the application for a new trial, 63 N. J. Super. 16, 163 A. 2d 593.

The first of these statements is found at 34 N. J. 227, 168 A. 2d 9:

> "Finally, the testimony of the defendants at the hearing below, lacks credence."

The next, 34 N. J. 228, 168 A. 2d 9:

> "Substantial truth rests in the record of the original trial."

And, finally:

> ". . . We have examined the record with care and have concluded that the proffered evidence was untrue

and that there is no reasonable basis to say that the confessions were involuntary or that the State suppressed any evidence." 34 N. J. 228, 168 A. 2d 9.

We respectfully submit that these quoted statements are taken out of context and when restored to their original position and meaning lend no support for appellants' contentions. This argument was brought to the attention of the New Jersey Supreme Court on appellants' application for a new trial, based upon newly discovered evidence. This application for a new trial was filed approximately 16 months after the original trial and about 28 months after the murder.

At the hearing on this application the defendants took the stand and testified that they were beaten by the police at the time of their interrogations; they were under the influence of narcotics; they were deprived of sleep and food; they were continuously questioned by the police who "fed" them the story which ultimately appeared in their confessions. They further disavowed their confessions and testified to a version which they then claimed was the true story of the homicide. In this new version they claimed they did not go to the victim's store to commit robbery, but to collect a debt.

A complete digest of the testimony offered by the defendants themselves and by their witnesses, is found in the opinion of the trial court who heard the testimony at 63 N. J. Super. 16, 162 A. 2d 593 and outlined in the opinion of the New Jersey Supreme Court commencing at 34 N. J. 219, 168 A. 2d 4. Upon a reading of the New Jersey Supreme Court's opinion, quoted above, it will be seen that the court was dealing with the question of whether a new trial should be ordered on the grounds that the defendants' confessions were untrue, and not with the standard of

formula to be applied in determining whether the confessions were voluntary.

In other words those quotations were extracted from an opinion dealing with an application by these defendants for a new trial on grounds of newly discovered evidence. The testimony at the hearing on the County Court level, 62 N. J. Super. 16, 163 A. 2d 593 (1960), aff'd 34 N. J. 212, 168 A. 2d 1 (1961), submitted by the defendants, differed entirely in substance from the admissions and narrative related in the confessions. The quotations, which the defendants claim are indicative of the fact that the New Jersey Supreme Court concluded the confessions were admitted into evidence because they were considered to be the truth, in whole or in part, actually were in no way involved in the question of the voluntariness of the confessions.

The language which the New Jersey Supreme Court used conveyed the meaning that the confessions contained the truth, in contrast to the evidence which the defendants gave at the hearing on the application for a new trial, and which differed from that in the confession. At no point in any proceeding involving these defendants is there the slightest suggestion that the admission of the confessions in evidence was based on the factor of truthfulness, rather than voluntariness. The District Court below so interpreted the remarks of the New Jersey Supreme Court. Therefore, it correctly concluded that this argument was without basis (69a). When the New Jersey Supreme Court dealt with the question of the voluntariness of the confessions, 34 N. J. 212, 223, 224, it never referred to the point of the truthfulness of the confessions.

At the original trial after the attorney for Cassidy answered he had no testimony or evidence to offer on the question of the voluntariness of the confessions (153a) the court specifically found that the Cassidy confessions "were voluntarily secured from that defendant" (154a). And at

the same trial after the State moved the court to determine that the confession of Johnson was voluntary, the attorney for Johnson objected, claiming the confessions were involuntary because there were no facilities provided for the defendant to rest or sleep and "some time elapsed between the arrest of defendant and the actual taking of the confession." (J403a). The court overruled this objection and found that the Johnson confession was voluntary (221a). Nowhere in the record of the original trial did the court make its determinations that the confessions were voluntary on the basis of the truthfulness thereof. As a matter of fact, at the time the court made its determinations it had not seen or heard of the contents of the confessions.

We submit that there is no basis for the contention that the New Jersey courts applied an impermissible standard in determining whether the confessions were voluntary.

III.

The defendants were found guilty by a fair and impartial jury.

At the original trial, the fourteen jurors were empanelled to sit and hear the case, pursuant to the provisions of N. J. S. 2A 72-4. Under this statute, the court may excuse any of the jurors provided that the number is not reduced to less than twelve. If more than twelve are left on the jury at the conclusion of the court's charge, all of the remaining jurors' names are placed in a suitable box and twelve of the jurors are selected to determine the issues. On the voir dire, juror Grace M. Wheeler was asked the following question:

> "Have you ever been the victim of a robbery, or has any of your friends or relatives ever been the victim of a robbery?"

She answered:

"No, I have not, no one that I know of."

She was seated as one of the fourteen jurors. She sat during the trial, but was excused for illness before its conclusion and did not participate in the jury's deliberations.

At the hearing on the application for a new trial, she testified that her husband had been the victim of three armed robberies about 18 or 19 years before she was summoned for jury duty at the original trial. That at the time she answered questions on the voir dire she believed she had told the truth. She did not remember the incidents relating to her husband and, in fact, the truth was that had she, she would have told it if that would have excused her as a juror. She had completely forgotten about it. The first she recalled the incident was about six months after the jury trial. The subject matter came up in a conversation between herself, her husband and a third party, and she exclaimed she was asked that question but had not thought about it. The memory of these incidents did not remain with her.

She further testified that she had never discussed the facts of the case with any other member of the jury and, of course, had not discussed any of the facts of her husband's experience with the jury and that she had never heard any of the jurors discussing the case (Wheeler, 288a-292a).

Another juror, Alice Conroy, testified that the jurors did not discuss the case among themselves because the court had cautioned them not to discuss it (Conroy, 286a-288a). Three other jurors were called, by the defendants, who were present in the court room, but were not asked to testify and were excused by the appellants (293a to top of 294a). Based upon these facts, the trial judge who heard the testimony on the application for a new trial, concluded:

"Her testimony at this hearing indicates that the case of these defendants was not discussed during the trial between sessions by the jury since the court had impressed upon the jurors their duty was not to discuss the case until it had been concluded and they had reached the point of deliberating on the verdict. The fact that she stated she did not recall her husband's experience until six months after the trial was concluded would justify the inference that even if there was some discussion she did not talk about her husband's experience. Nevertheless, since she was not a part of the jury which rendered the verdict it can not be said that the jury's verdict was tainted." 63 N. J. Super. 16, 37, 162 A. 2d 593, 604.

On appeal, the New Jersey Supreme Court unanimously affirmed the findings of fact and conclusions of law found by the court below. 34 N. J. 212, 168 A. 2d 1 (1961); cert. den. 370 U. S. 928 (1962). Both the trial court below and the New Jersey Supreme Court on appeal, distinguished the facts from the case at bar from those found in *U. S. ex rel. Devita v. McCorkle*, 248 F. 2d 9 (3rd Cir. 1957), cert. den. 355 U. S. 873 (1957). It was pointed out by the New Jersey Supreme Court that in the case at bar, Mrs. Wheeler, unlike Kuhnle, the questioned juror in *Devita*, was not on the jury which found the defendants guilty. She was excused before the jury retired to deliberate.

Appellants persist in arguing that, notwithstanding these points of distinction, Mrs. Wheeler contaminated the verdict because she was a member of the fourteen-member jury panel for the approximate two weeks that the trial lasted. They argue through fanciful conjectures that Mrs. Wheeler may have transmitted her bias to the other jurors, notwithstanding the clear, uncontradicted testimony of Mrs. Wheeler and Mrs. Conroy, that the jury never discussed

the case amongst themselves because they were so instructed by the court.

Significantly we point out that three other members of the jury panel were present in the court room pursuant to their subpoenaes, but were never called to testify and were excused. The New Jersey Supreme Court dealt with this proposition by saying (id. p. 218, id. p. 4):

> "Additionally, we note that three other members of the jury were subpoenaed by the defendants, were present at the hearing, but were not called to testify. We think it fair to assume that if these jurors would have testified that any matters pertaining to the case were discussed prior to their deliberations, they would have been called by defense counsel."

The court below concluded that there was no merit on this point (91a).

We submit that the issue involved must be resolved on the uncontradicted facts rather than upon the mere conjectures of counsel. We feel that we could add nothing to the argument other than what the New Jersey Supreme Court has already said, and we rely thereon in support of our conclusion that the holding of the court below on this point should be affirmed.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

NORMAN HEINE,
Counsel for Respondent.

(Date)